

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABSU G. ESAYAS,¹

Defendant-Appellant.

UNPUBLISHED

June 1, 2006

No. 259567

Oakland Circuit Court

LC No. 2003-192893-FC

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of criminal sexual conduct, MCL 750.520d(1)(c). Defendant was sentenced to 18 months to 15 years' imprisonment for each count. We affirm.

Defendant's convictions arise out of his encounter with the victim. The victim fled from a psychiatric facility and hid in a church bathroom where she encountered defendant, who worked at the church. The victim went with defendant and another man to a party store to purchase alcoholic beverages and condoms. The three then went to a motel and engaged in sexual activities. The next day, the victim was left off at Oakland Mall. After a long period of time at the mall, the victim told an employee that she needed assistance. The victim reported that she was raped. Defendant spoke to police on multiple occasions. Initially, he denied any sexual contact with the victim. Defendant told police that after leaving work with the victim, she began acting differently or strangely. He reported that they were in the parking lot of a bar when police drove by. The victim would duck to hide from the police. Consequently, the men did not want to spend any more time with her and dropped her off. At a subsequent interview, defendant told police that the victim was "acting weird," and he asked her if she needed to go to the hospital or a police station on several occasions. At that time, the victim would threaten to jump from the car or run away. The men drove around with her in the car and eventually let her out of the car and drove away. Defendant was interviewed again and confronted with the fact that the

¹ We note that the lower court record predominantly refers to defendant as "Absu G. Esayas." However, during trial and in the defense pleadings, defendant was referred to as "Esayas Absu." Because of the disparity, the caption is consistent with the heading contained in the judgment of sentence.

motel room was registered in defendant's name. He told police that he went to the room with a female friend. Later, defendant admitted that he had sex with the victim at the motel.

Defendant first alleges that he was denied a fair trial by the improper admission of expert testimony regarding an essential element of the case. We disagree.² Admission of evidence is normally reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Defendant failed to preserve this issue by making a timely objection in the lower court. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Unpreserved, nonconstitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error occurred, (2) the error was plain, i.e., clear and obvious, and (3) the plain error affected substantial rights. *Carines*, *supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden with respect to prejudice. *Carines*, *supra* at 763. Once the defendant establishes those three elements, the appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Carines*, *supra* at 763.

Expert opinion that embraces an ultimate issue to be decided by the trier of fact is not objectionable. MRE 704. An expert may testify regarding a victim's mental state, but cannot provide a definition of legal terms for the jury. *People v Caulley*, 197 Mich App 177, 193-194; 494 NW2d 853 (2002). An expert's opinion regarding the law is of no aid to the jurors and could possibly confuse them. *People v Anderson*, 166 Mich App 455, 464; 421 NW2d 200 (1988).

After reviewing the testimony at issue in context, we cannot conclude that plain error affecting substantial rights has been established. The trial court, not the parties, inquired of the expert about the statutory definition of mental illness. However, the trial court did not provide the statutory definition of mental illness to the expert at the time the question was posed. Consequently, the trial court continued to question the witness regarding mental illness, psychosis, and mental disease. The trial court's inquiry included behaviors exhibited in conjunction with the victim's diagnosis and history of illness. Although initially phrased improperly, the trial court moved away from an inquiry at law to the meaning of the psychological terms with regard to the individual circumstances of this victim. The parties did not object to this questioning by the trial court at any time.³ Accordingly, this claim of error does not provide defendant any form of relief.

² We note that defendant's statement of the questions presented alleges that the witness was a "surprise" and unqualified expert. Despite the statement of the issue, the brief on appeal does not challenge the expert's qualifications and allege how the testimony was a surprise. Indeed, the expert was listed on the prosecutor's witness list prior to trial. Accordingly, that portion of the issue has been abandoned on appeal.

³ Defendant's appellate counsel also represented him at trial. There was no objection to this
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Defendant next alleges that the trial court erred in denying his motion for a new trial because the verdict was against the great weight of the evidence. We disagree. This Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A new trial will not be granted based on conflicting testimony, even where the testimony has been impeached to some extent. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). The trial court must defer to the jury's determination of credibility unless the contradictory testimony was so far impeached that it lacked all probative value such that it could not be believed by the jury or it contradicted indisputable physical facts. *Musser, supra*.

Defendant was convicted under MCL 750.520d(1)(c), which provides that a person is guilty of committing criminal sexual conduct if he engages in penetration with another person whom he knew or had reason to know was mentally incapable. "Mentally incapable" means "suffer[ing] from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(g). That definition encompasses "not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act." *People v Breck*, 230 Mich App 450, 455; 584 NW2d 602 (1998). Statutes prohibiting sexual relations with a mentally incapable individual are necessary because the person is presumed to be incapable of truly consenting to the sexual act. *Id.*

Defendant argues that the great weight of the evidence establishes that the victim was capable of understanding both the physical and moral qualities of having sex with defendant. We conclude that the verdict was not against the great weight of the evidence. As described by her doctor and her father, the victim suffers from a number of mental problems. While the victim herself claims some knowledge of sex and did state that she had been raped, it is not clear that she is the best judge of her own capabilities. Contrary to what defendant argues on appeal, the fact that the victim was frightened during her time with defendant and only had sex with him because she was scared does not establish that she knew what sex is and means. First, nothing in the record suggests that the victim was afraid of the act of sex itself. Second, defendant cites no authority for the proposition that one must understand something to be afraid of it. The evidence conflicts in this case and leaving the issue of credibility to the jury, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.⁴

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inquiry at trial. Counsel may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). A defendant may not waive objection to an issue at trial and assert it as error on appeal. *Id.*

⁴ Although we note that the evidence from the victim conflicted, defendant's statements to police indicate that the verdict was not against the great weight of the evidence. Defendant revealed that he was aware that the victim suffered from some deficiency. He reportedly told police that he offered to take the victim to the hospital or to the police station on multiple occasions because

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Defendant next asserts that the trial court erred in defining the term “mentally incapable” for the jury during the jury instructions. A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *Carter, supra* at 215. Defense counsel stated that he had no objection to the instructions as given by the trial court and that he approved the instructions. By expressly approving the instructions as given, defendant has waived this issue on appeal.

Defendant’s fourth issue on appeal is that the cumulative effect of the errors discussed above denied defendant a fair trial. This Court reviews this issue to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. *Id.* at 388. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Prejudicial error has not been identified in this case. Therefore, defendant’s challenge on this basis is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

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she was acting strangely. Despite the notice of her deficiencies, defendant took the victim to a motel room, provided her with alcoholic beverages, and engaged her in sexual activities. Although defense counsel attributed his conduct to his limited time period in this country, the jury rejected his explanation.